Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for Decision

L.L.,

complainant,

and

Syndicat des Métallos, Local 7065,

respondent,

and

Logistec Stevedoring Inc.; Relais Nordik Inc.; Porlier Express Inc.,

employers.

Board File: 28094-C

B.J.,

complainant,

and

Syndicat des Métallos, Local 7065,

respondent,

and

Logistec Stevedoring Inc.; Porlier Express Inc.,

employers.

Board File: 28580-C

Canada

B.J.,

complainant,

and

Syndicat des Métallos, Local 7065,

respondent.

Board File: 28618-C
Neutral Citation: 2013 CIRB **674**
February 5, 2013

The Canada Industrial Relations Board (the Board) was composed of Ms. Louise Fecteau, Vice-Chairperson, sitting alone pursuant to section 14(3) of the *Canada Labour Code (Part I Industrial Relations)* (the *Code*).

Appearances

Mr. Grégoire Dostie, for L.L. and B.J.;

Mr. Pierre Lalonde, for the Syndicat des Métallos, Local 7065;

Mr. Patrick Galizia, for Logistec Stevedoring Inc.;

Mr. Patrice Boudreau, for Porlier Express Inc.

I–Introduction

[1] The Board issued its decision in this matter on January 11, 2013, during a conference call with the parties. The parties were given until January 24, 2013, to agree on remedies, failing which the Board would issue these written reasons for decision.

[2] This decision relates to the determination of remedies for L.L. and B.J. arising from the union's violation of sections 37 and 69 of the *Code*. In *L.*, 2012 CIRB 636 (RD 636), the Board found among other things that the union had violated the *Code* when it had negotiated two letters of agreement with Logistec Stevedoring Inc. (Logistec) and Porlier Express Inc. (Porlier) to eliminate the seniority criterion in order to add five casual longshoremen to Appendix A in the collective agreements, which related to permanent longshoremen.

[3] The Board held a conference call with the parties on August 22, 2012, and a hearing in Sept-Îles from September 24 to 26, 2012, in regard to the remedies.

II–Overview of Findings in RD 636

[4] The following is a summary of the Board's findings in RD 636:

- The union acted arbitrarily and violated section 37 of the *Code* when it decided to eliminate the seniority criterion by entering into letters of agreement with the employers. The Board found that responsibility for the elimination of the seniority criterion lay solely with the union as the union initiated the process with the employers. In fact, the evidence showed that the employers agreed to the names produced by the union, subject to the medical exam, without questioning employees' rankings.
- The union breached its duty of fair representation under section 37 of the *Code* by refusing to file a grievance on behalf of B.J. in January 2011. The Board found that the union had acted arbitrarily.
- Establishing rankings no longer in line with the seniority criterion was arbitrary and resulted in favouritism toward certain workers who were relatives of union members. The Board found that such conduct was discriminatory within the meaning of section 69.
- The union violated section 95(*i*) of the *Code* by suspending B.J. as a member in good standing because he had filed a complaint with the Board. The Board found that B.J.'s status as a member in good standing had to stand.

A–Time Material to This Case

[5] The following facts are of note:

- The letters of agreement eliminating the seniority criterion were signed on February 12, 2010, in the case of Logistec and on April 16, 2010, in the case of Porlier. At the time the letters of agreement were signed, the two complainants were working for Logistec and Porlier.
- L.L. stopped working on January 29, 2010. The union offered to add his name to Appendix A on November 17, 2011.

- B.J.'s name was added to Appendix A on March 8, 2010, but he was improperly ranked. The union stopped calling B.J. completely on November 13, 2010.
- B.J. was off work from February 9, 2011, to September 30, 2011, because of an adjustment disorder. In early October 2011, he stopped working completely because of recurrence of his cancer.

III–Parameters

[6] After carefully considering the parties' written submissions, the Board scheduled a conference call with the parties for August 22, 2012, to outline for them the parameters that it would use to rule on each of the remedies, with a view to facilitating a settlement.

[7] Among other things, the Board indicated that there were certain limitations on the broad remedial powers conferred on it by section 99 of the *Code*. Remedies must be rationally connected with the union's breach of the *Code* and its consequences and must be consistent with the objectives of the *Code*.

[8] The Board also indicated that it cannot order remedies that are punitive in nature (see *Royal Oak Mines Inc.* v. *Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369; and *Beaudet-Fortin*, 2001 CIRB 132). It reiterated the fact that ordering reimbursement of legal fees and expenses is an exceptional measure, but that it has the authority to issue such an order, so far as is reasonable.

[9] In regard to the period of compensation material to this case, the Board indicated that the period could not start earlier than February 12 or April 16, 2010, the dates on which the agreements eliminating the seniority criterion had been signed, and could not extend beyond the date on which the decision respecting remedies was made (no future damages).

[10] As for the methodology to be used to assess lost wages, the Board indicated that it would return the complainants to their respective rankings on the seniority list and it invited the parties to make submissions about the applicable methodology. The Board pointed out that the case law of other labour relations boards has used an average of employee wages to determine lost wages for an employee working through hiring halls.

[11] The Board indicated that, in B.J.'s case, it would deduct (private) wage-loss insurance benefits received in determining lost wages.

[12] It further indicated that, in L.L.'s case, it would not be playing the role of insurer and had no intention of considering L.L.'s health in determining financial compensation.

[13] The Board asked the parties, including the employers, to make submissions on the points outlined either in writing or at the hearing of September 24, 2012. Counsel for the employer made written submissions but did not attend the hearing.

IV–Evidence

[14] Counsel for the complainants called L.L. and B.J. to testify. Counsel for the union called Mr. Nelson Breton as a witness.

A–L.L.

[15] L.L. is 58 years old. He has worked as a longshoreman since 1996. He has worked as a labourer, operator (except for crane operator), forklift and loader operator (his qualifications are disputed).

[16] In 2009, he worked 735 hours despite having to take three months off work.

[17] L.L. indicated that he would have worked the same hours as Mr. Bernatchez had his name been added to Appendix A. He also mentioned pay stubs for Messrs. Ritchie-Beaudin, Gravel-Bourgeois, Bernatchez and Thériault—employees whose names were added to Appendix A—for purposes of comparison.

[18] L.L. stopped working on January 29, 2010. He testified that, since 2010, he has not been going out as much as before and rarely goes hunting or fishing. He stays in his home. He is depressed.

[19] L.L. consulted his doctor in May 2010 and has been seeing his family doctor, Dr. Bois, for regular follow-ups for his depression. In September 2010, his doctor suggested that he see someone about his drinking problems. He saw a psychologist twice, but did not find it useful. In

January 2011, his doctor told him that he would be fit to return to work in February 2011, but L.L. was afraid of threats should he return to his job as a longshoreman.

[20] L.L. continued to see his family doctor in 2011. In January 2012, Dr. Bois signed a statement indicating that L.L. should no longer work in his former job of longshoreman.

[21] On May 7, 2012, L.L. met with Dr. Nowakowski for a psychiatric assessment, at the request of his union. Dr. Nowakowski concluded that the complainant had been suffering from an adjustment disorder since early 2010, but that the disorder was going into remission. According to the doctor's report, the adjustment disorder was partially connected with the dispute between L.L and his union.

[22] In 2010, L.L. received employment insurance benefits. The evidence in fact showed that most longshoremen collect employment insurance benefits when they are not called for work. In 2011 and 2012, L.L. received social assistance benefits.

[23] L.L. testified that he did not want to go back to work as a longshoreman, since he was afraid of reprisals. L.L. indicated that he knew he had to undergo tests to be added to Appendix A, but stated that he had not been psychologically prepared to take the tests when asked to do so in November 2011.

B–B.J.

[24] B.J. is 45 years old. He has been a longshoreman since 1997. He has worked as a labourer, team leader, flagman and forklift operator (his qualifications are disputed). He is ranked 46th on the list of permanent longshoremen. In 2009, he worked 779 hours.

[25] In early 2010, his name was added to Appendix A. He worked 404 hours as a permanent longshoreman and 146 hours as a casual longshoreman. B.J. also worked 406 hours for Logistec Minerai to increase his earnings.

[26] B.J. stopped working on February 8, 2011, because of an adjustment disorder. On September 30, 2011, he had to stop working completely because of recurrence of his cancer. Between May 26 and September 30, 2011, he collected wage-loss insurance benefits from

SunLife and Industrial Alliance because of his adjustment disorder and has since been collecting full disability insurance benefits in relation to the recurrence of his cancer.

[27] B.J. indicated that he had received employment insurance or wage-loss insurance benefits for the period from February 9 to September 30, 2011.

C–M. Breton

[28] Mr. Breton is the president of the union. He indicated that he would take whatever steps were necessary to deal with any problems should L.L. decide to return to work and feel threatened. He stated that the complainants could return to work in a healthy work environment at any time.

[29] Mr. Breton is responsible for issues of employee eligibility for the group insurance plan, which includes long-term wage-loss insurance. He explained how the plan works and the union's obligations toward the insurance carrier.

[30] Mr. Breton indicated that an employee who has to be off work must advise him immediately so that he can send the necessary papers to the insurance company.

[31] The first 15 weeks off are covered by employment insurance sickness benefits. Long-term wage-loss insurance applies thereafter, at a rate of 66.67% for the first $2,500 of monthly wages.

[32] When the worker returns to work, the insurance premiums must be reimbursed unless the person is exempt.

[33] Since the Board issued its decision in this matter, casual workers have also obtained coverage under the group insurance plan. A casual worker is covered provided that he or she worked at least 1,000 hours the previous year. Hours are calculated in December. This is a new rule, which was not in effect prior to the fall of 2011.

[34] Mr. Breton states that, even if L.L. had been in Appendix A, he would not have been eligible for the insurance, since he had not worked 1,000 hours the previous year, that is, in 2009.

[35] Mr. Breton also explained the terms and conditions of the pension plan mentioned in the collective agreements. Employer contributions in particular are mentioned. The collective agreements also state that employees contribute to the plan at a rate of 50% of the employer's contribution. They also state that contributions to the pension plan are based on hours worked.

V–Positions of the Parties

A–Case of L.L.

1–L.L.'s Position

[36] In his written submissions, counsel for L.L. estimated that L.L. was entitled to $1,500,000 in compensation from the union and the employers concerned, including future and punitive damages. That amount was adjusted at the oral hearing, however. L.L. is claiming $267,677 in lost wages, damages for pain and suffering, and pension plan contributions, based on the earnings of Mr. Bernatchez to September 24, 2012, the date of the start of the oral hearings.

a–Ranking

[37] L.L. should have been ranked 46th. However, he indicated that he no longer wants to be added to Appendix A, for a number of reasons, including his health problems, which he contends are related to the stress suffered because of the union's conduct.

b–Damages for Gross Lost Wages

[38] L.L. states that his gross wages would have been equivalent to those of Mr. Pierre Bernatchez, who is ranked 48th in Appendix A. He indicates that he has the same qualifications as Mr. Bernatchez and that he would have been the one to work the hours worked by Mr. Bernatchez had he been called before Mr. Bernatchez, as he should have been.

[39] For 2010, L.L. is claiming $93,289.64, that is, Mr. Bernatchez's gross earnings plus contributions to the pension plan, minus the $3,204 that the complainant earned in 2010.

[40] L.L. is claiming $101,788 for 2011 and $72,600 for 2012 (to September 24), that is, Mr. Bernatchez's gross earnings plus contributions to the pension plan.

[41] L.L. submits that he had no history of depression prior to the union's offending conduct. He alleges that there is a causal connection between the union's offending conduct and his time off work during the entire period in question. In his view, the medical reports explain his inability to work as a longshoreman because of the union's conduct and indeed can explain his absence since January 29, 2010, even though he did not see the doctor until May 2010. In that regard, L.L. submits that the Board should rely on the medical reports provided by Dr. Bois rather than the report by Dr. Nowakowski, who saw him only once.

[42] L.L. alleges that he was unable to accept the union's offer to add him to Appendix A in November 2011, since his doctor had declared him unfit to work at that time.

c–Damages for Pain and Suffering

[43] L.L. is claiming $300,000 in damages for pain and suffering, for the stress he has suffered since January 2010. He states that the stress has led to a number of health problems and negatively impacted his quality of life.

[44] Counsel for L.L. alleges that the Board enjoys some latitude in awarding damages for pain and suffering and that, under the circumstances, there is a connection between the violation by the union and the pain and suffering experienced by L.L.

d–Legal Fees and Expenses

[45] L.L. is asking that the Board order the union to cover all legal expenses incurred as a result of the proceedings before the Board, given the union's obvious bad faith.

2–Union's Position

[46] The union argues that L.L. has systematically refused to work since the start of 2010 and that he was declared unfit to work because of an adjustment disorder.

[47] The union alleges that L.L. did not establish any connection between his diagnosis of an adjustment disorder and the events alleged against the union. The union relies on the report produced by Dr. Nowakowski, who examined L.L. and concluded that he had "an adjustment

disorder likely linked with excessive alcohol consumption and a real lack of motivation" (translation).

[48] The union submits that the Board does not have jurisdiction to entertain L.L.'s claims for pecuniary damages, damages for pain and suffering and punitive damages. Additionally, the union argues that there are no exceptional circumstances in this case that dictate the granting by the Board of legal fees and expenses.

[49] In regard to the quantification of damages, the union states that Mr. Bernatchez's earnings are not an appropriate indicator since the latter worked more hours than L.L. even in 2007, 2008 and 2009 and has many more qualifications.

[50] The union submits that L.L. would not have worked more hours had his name been added to Appendix A. It alleges that L.L. would only take jobs working on loaders and forklifts. The union relies in this regard on the testimony of Mr. Pouliot at the hearing on the merits of the complaints.

[51] The union alleges that, if the rules for the insurance policy were properly applied, L.L. would not in any case have been entitled to insurance benefits since he had not been working 1,000 hours. The union submits that L.L. should not be entitled to damages in excess of his actual loss. It explains that, had L.L. been entitled to insurance benefits, he would have received 66.67% of his earnings for the first $2,500 of monthly earnings and 45% for the remainder, to a maximum of $2,500 a month. The union alleges that a look at the hours worked between 2006 and 2009 will give the Board an idea of what L.L. would have received in insurance benefits.

[52] The union submits that, to determine the number of hours that L.L. would have worked, it is necessary to consider others with the same qualifications, that is, others working on forklifts and loaders. The union alleges that the Board cannot compare L.L. to the people at the top of the seniority list, but must instead look at the five people who were added to the list in 2010: Messrs. Ritchie-Beaudin, Gravel-Bourgeois, Bernatchez, Thériault and B.J. The union explains that, by relying on the average earnings of those individuals, the Board can determine the amount that L.L. would have been entitled to receive had he collected wage-loss insurance benefits.

[53] In his written submissions, counsel for the union alleges that, if L.L. is owed amounts as a result of offending conduct on the part of the union and his illness, which he denies, the period of compensation cannot start before L.L.'s doctor instructed him to take time off work and cannot go beyond February 2011, when he was cleared to work. In the union's estimation, the period in question is therefore 10 months and, based on his earnings in 2008 and 2009, L.L.'s earnings in those 10 months would have totalled $22,384.75.

[54] Lastly, the union indicates that it offered to add the complainant to Appendix A in 46th rank in November 2011, but the complainant turned down the offer, alleging that he was afraid to return to work. The union argued that L.L.'s fears are not supported by the evidence.

[55] The union indicates that, at a meeting in the fall of 2011, it changed its practice and added casual longshoremen to its ranks.

B–Case of B.J.

1–B.J.'s Position

[56] In his written submissions, counsel for B.J. claimed $257,116.28 from the union, including punitive damages. The claim amount was adjusted at the hearing, however. B.J. is claiming $71,261 in lost wages and contributions to the pension plan as well as damages for pain and suffering.

a–Ranking

[57] B.J. is asking to be ranked 46th instead of 47th in Appendix A, since L.L. no longer wants to be on the list, and more particularly, ahead of the following permanent longshoremen: Messrs. Ritchie-Beaudin, Gravel-Bourgeois and Bernatchez.

b–Damages for Gross Lost Wages

[58] At the hearing, counsel for the complainants presented claims tables containing a calculation of the average wages of Messrs. Thériault, Gravel-Bourgeois and Bernatchez, for comparison purposes.

[59] B.J. is claiming $71,261 in lost wages and contributions to the pension fund to September 30, 2011. For 2010, he is claiming gross wages of $32,616 starting on March 8, 2010 (the date when his name was added to the list of permanent longshoremen), which is an average of the earnings of the three longshoremen mentioned minus what B.J. earned as a longshoreman and at Logistec Minerai. For 2011, using the same formula, he is claiming gross wages of $30,504 to September 30, 2011, when he became unfit to work.

[60] Counsel for B.J. deducted the amount B.J. would have earned at Logistec Minerai, which is currently the subject of an action in Quebec Superior Court.

[61] B.J. submits that the wage-loss insurance benefits would have been higher had he worked more hours in 2010. Consequently, counsel for B.J. is asking that the Board not subtract what B.J. collected in insurance benefits in 2011.

c–Damages for Pain and Suffering

[62] B.J. is claiming $50,000 in damages for pain and suffering, for a number of reasons, including the stress caused by his union.

d–Legal Fees and Expenses

[63] B.J. is also asking that the Board order the union to reimburse him for his legal fees and expenses, given the union's obvious bad faith.

e–Other Remedy

[64] In connection with the violation of section 95(*i*) of the *Code*, B.J. is asking that the Board order the union to cancel all disciplinary action against him and to desist from discriminating against him.

2–Union's Position

a–Preliminary Issues

i–Concurrent Proceedings

[65] The union submits that the Board should refuse to hear part of B.J.'s claims until such time as B.J. drops his action in Superior Court. In his action against the union and Mr. Bourgeois in Superior Court, B.J. is claiming $88,000 for lost wages because of disability, pain and suffering and inconvenience associated with the recurrence of his cancer, and various expenses related to an incident that occurred on February 8, 2011. The union consequently alleges that the Board need not rule on whether B.J.'s illness was caused by the union.

ii–Timeliness of Claim for Damages for 2010

[66] The union argues that the claim for damages for lost wages is untimely for the entire period prior to November 8, 2010, or thereabouts.

b–Ranking

[67] The union has no objection to B.J. being ranked 46th. It argues that the ranking will not affect B.J.'s earnings.

[68] The union submits that any determination of ranking is an issue for a grievance arbitrator.

c–Damages for Gross Lost Wages

[69] The union alleges that the claims for damages for lost wages are without merit, as B.J. received full compensation from the insurance companies during his time away from work.

[70] The union argues that B.J. received more in insurance and other wage replacement benefits while away sick than he could have earned in wages, based on the hours he had worked in 2009 and 2010. The union alleges that the Board cannot assume that B.J. would have worked overtime had he been properly ranked in Appendix A.

[71] The union argues that the Board cannot order it to compensate B.J. for the period from February 9, 2011, to September 30, 2011, since he was away from work and collecting insurance benefits. In its view, compensating B.J. for that period of time would amount to unfounded enrichment. Additionally, the matter of the time period has been put before the Superior Court by B.J.

[72] Alternatively, the union submits that the wages of Messrs. Bernatchez and Gravel-Bourgeois are not good indicators for comparison purposes, since the two longshoremen have more qualifications and were much more available than B.J., even though they had less seniority. The union suggests instead that the Board rely on the wages of Messrs. Thériault and Ritchie-Beaudin for comparison. It alleges that, contrary to B.J.'s claims, Mr. Ritchie-Beaudin was not away from work during 2010.

d–Damages for Pain and Suffering and Punitive Damages

[73] The union submits that the claims for damages for pain and suffering and punitive damages are without merit and that the Board does not have jurisdiction to entertain them. The union disputes B.J.'s allegation that he felt harassed by Mr. Ritchie-Beaudin, explaining that it was made aware of B.J.'s inability to work only after the fourth call.

e–Legal Fees and Expenses

[74] The union emphasizes the exceptional nature of an order for reimbursement of legal fees and expenses. It submits that there are no exceptional circumstances in this matter to warrant such an order.

f–Other Remedy

[75] The union submits that the Board does not have jurisdiction over internal union matters. Additionally, the union states that no evidence was produced to show that the union had used threats, coercion or monetary penalties against B.J.

3–Employers' Position

[76] The employers submit that they should not be held accountable for any order by the Board for monetary compensation, including any order to compensate for other advantages provided for in the collective agreement. They refer to paragraphs 107, 109 and 112 of RD 636.

[77] The employers allege that the remedies sought by B.J. concern the union only and in no way concern them.

[78] As for the arguments made by L.L., Logistec submits that it always showed itself open to adding his name to Appendix A.

VI–Analysis and Decision Respecting Each of the Remedies Sought

A–Preliminary Issues

1–Concurrent Proceedings

[79] Given that counsel for B.J. deducted the amount claimed by B.J. in Superior Court from the amount claimed in the matter before the Board, the Board cannot accept the union's argument that it should refuse to hear part of B.J.'s claims until B.J. drops the Superior Court action against the union and Mr. Bourgeois, president of Local 7065.

2–Timeliness

[80] The union submits, as it did in the matter of the initial complaint, that B.J.'s claim for damages for lost wages is untimely for the entire period prior to November 8, 2010, or thereabouts, since B.J.'s first complaint, filed on February 8, 2011, was out of time because the events giving rise to that complaint dated back farther than November 2011.

[81] The Board points out that it has already ruled on this question, in RD 636, deciding to dismiss the union's preliminary objection and declaring B.J.'s complaint filed on February 8, 2011, timely, since B.J. had not known of the circumstances giving rise to the complaint until January 2011 or, at the earliest, November 13, 2010, when the union had stopped calling him.

B–Remedies

1–General Rules

[82] The relevant provisions of the *Code* read as follows:

> 99.(1) Where, under section 98, the Board determines that a party to a complaint has contravened or failed to comply with subsection 24(4) or 34(6), section 37, 47.3, 50 or 69, subsection 87.5(1) or (2), section 87.6, subsection 87.7(2) or section 94, 95 or 96, the Board may, by order, require the party to comply with or cease contravening that subsection or section and may
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> ...
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> (*c*) (ii) pay to any employee or other person affected by that failure compensation not exceeding such sum as, in the opinion of the Board, is equivalent to the remuneration that would, but for that failure, have been paid by the employer to that employee or other person.

[83] The Board wishes to point out the parameters that it must apply in issuing an order aimed at remedying or counteracting the consequences of failure by a union or employer to comply with provisions of the *Code*, as in the matter determined in RD 636. It refers to what the Supreme Court of Canada stated in *Royal Oak Mines Inc.* v. *Canada (Labour Relations Board)*, *supra*, regarding remedies that are unreasonable:

> ... A remedial order will be considered patently unreasonable where: (1) the remedy is punitive in nature; (2) the remedy granted infringes the *Charter*; (3) there is no rational connection between the breach, its consequences, and the remedy; (4) the remedy contradicts the objects and purposes of the *Code*. A rational connection did indeed exist between the breach, its consequences and the remedy and the remedy affirmed the objects and purposes of the *Code*.
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> (page 372)

[84] In light of what the Supreme Court of Canada indicated regarding remedies of a punitive nature, the Board is unable to order punitive damages in this matter, since such an order would contradict the objects and purposes of the *Code*.

[85] That said, by virtue of the remedial powers conferred on it by section 99 of the *Code*, the Board may, according to such terms as it deems appropriate, order the payment of damages to a party whose rights under the *Code* have been contravened. However, case law has placed some limitations on the exercise of those powers. The Board's decisions have been consistent in that the remedies imposed have been for the purpose of compensating for damages caused by the breach. In other words, there must be a connection between the unfair practice or any other

failure in the duties imposed by the *Code* and a compensable loss. In *National Bank of Canada* v. *Retail Clerks' International Union et al.*, [1984] 1 SCR 269, the Supreme Court of Canada stated the following:

> The fact remains that a remedy ordered pursuant to s. 189 [now section 99] must be one authorized by that section. In my view, it is essential for there to be a relation between the unfair practice, its consequences and the remedy.
>
> (page 288)

[86] In a more recent decision (*VIA Rail Canada Inc.* v. *Cairns*, 2001 FCA 133; [2001] 4 F.C. 139), the Federal Court of Appeal reaffirmed the very broad powers held by the Board under section 189 (now section 99(2) of the *Code*). It stated the following:

> [57] In deciding upon the appropriate standard by which to review the Board's remedial order, I base my analysis upon the discussion at paragraphs 29 to 40 of these reasons, to the extent that that discussion deals with the *Code*'s privative clause, the Board's expertise and the purposes of the *Code*. The Board's remedial order was an equitable one, fashioned under the authority of subs. 99(2) of the *Code*. The Board's authority under that provision is exceptionally broad. The impact of exceptionally broad authority granted to the Board under that provision was discussed. in *Royal Oak Mines* v. *Canada (Labour Relations Board)*, a case involving a remedy that encroached upon the principle of free collective bargaining. Writing for the majority, and in the contem of a pragmatic and functional analysis of the provision, Cory J. held:
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> "The breadth of the remedial section gives a clear indication that it was the intention of Parliament that the Board should be given the necessary flexibility to fashion remedies which will best address the entire spectrum of problems and of factual situations which it must confront. It is noteworthy that the section was amended in 1978. Prior to that date, the *Code* allowed the Board to impose only those remedies which were specifically enumerated. Section 189 (now s. 99(2)) was added in 1978. This provision authorizes the Board to make orders based on the principles of equity. The section now gives the Board both the flexibility and the authority to create the innovative remedies which are needed to counteract breaches of the *Code* and to fulfil its purposes and objectives. The granting of such a broad discretion to the Board demonstrates that Parliament wished the courts to defer to the Board's experience and expertise in making remedial orders so long as they were not patently unreasonable."

[87] The Board's case law pertaining to remedies is limited when it comes to determining compensation to be paid. In *Larose-Paquette Autobus Inc.* (1992), 87 di 139; and 92 CLLC 16,064 (CLRB no. 924), the Board explained how it determines and calculates compensation, including how it deals with issues relating to earnings in the compensation period and employment insurance period. In that matter, the Board had to decide on the remedy for an employee who had been dismissed because of union activity. The Board stated the following:

> **Remuneration Lost and Earnings from Other Employment**
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> Pay at the time of dismissal is the starting point. ...

> A second rule requires that the Board take into account amounts earned elsewhere during the period; by this, we mean earnings from a job. A credit is therefore owed the employer for earnings from other employment.
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> ...
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> Unemployment Insurance
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> How are unemployment insurance benefits to be treated?
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> In determining the amounts the employer owes its employee, the Board will take into account earnings from other employment, but not the unemployment insurance benefits received. ...
>
> (pages 142–143; and 14,519)

[88] This does not mean that the employee is entitled to receive compensation for lost wages and keep the employment insurance benefits paid. On the contrary, it means that employment insurance benefits collected must be returned to the appropriate government authority in accordance with the applicable provisions of employment insurance legislation. Otherwise, the employment insurance fund would be paying part of the compensation payable by the party in violation of the *Code*.

2–Cases at Issue

[89] In accordance with the teachings of the Supreme Court of Canada, the Board has broad remedial powers under section 99 of the *Code* provided the remedies it imposes are not punitive in nature. The Board's decisions have been consistent in that the remedies imposed have been for the purpose of compensating for damages caused by the breach. In other words, there must be a connection between the failure in the duties imposed by the *Code* and a compensable loss. The Board must exercise caution in this regard, since each case must be considered on its own merits.

[90] In this matter, the evidence adduced in regard to remedies for both L.L. and B.J.—despite their circumstances being quite different—has satisfied the Board that there is a rational or direct connection between the union's unfair labour practices, their consequences for the complainants, and some of the remedies sought by them. However, the Board considers that any form of compensation for pain and suffering or future damages would be punitive in the instant matter and thus contradict the objectives of the *Code*.

[91] That said, given the circumstances, the Board will see that the affected parties are put back into the position that they would have enjoyed if it were not for the breach of the *Code* and that

the financial injury resulting from the breach is repaired. The Board will rely on the principles set out in *Larose-Paquette Autobus Inc.*, *supra*, to determine the amounts of financial compensation to be paid.

[92] In regard to the methodology the Board will use to return the affected parties to the position that they would have enjoyed were it not for the union's breach of the *Code*, the Board has no precedents to follow in assessing lost wages for longshoremen working through a hiring hall, as in this case. The Ontario Labour Relations Board has in the past based itself on an average of the wages of all active employees. Were the Board to rely on that methodology, it would have to work out the average earnings of some 50 active longshoremen whose names appear in Appendix A. Furthermore, the evidence shows that not all longshoremen in Appendix A have the same qualifications, and that longshoremen are free to accept jobs or refuse them without being penalized. That is why the telephone dispatcher starts with the list of permanent longshoremen and then moves on to the list of casual workers, proceeding in order of seniority, according to availability and qualifications. Longshoremen are moreover entitled to collect employment insurance benefits for periods when they are out of work. Additionally, one longshoreman with the same qualifications as another may make himself available for more jobs or for overtime, and a longshoreman may suffer an injury that results in fewer hours of work one year, as was L.L.'s case in 2009, when he had to be away from work for three months. The evidence shows that in 2010, for example, the earnings of longshoremen listed in Appendix A who had the same qualifications as L.L. varied significantly, from $4,355.20 at the low end ($45,072.13 in 2009) to $108,838.23 at the high end.

[93] L.L. and B.J. do not have the same qualifications. The parties disagree on the methodology. In the case of L.L., who should have been ranked 46th in Appendix A, his counsel suggests that his lost wages be based on the earnings of Mr. Bernatchez, on the basis that they have the same qualifications. The union, on the other hand, suggests using the wages of the five longshoremen added to Appendix A in 2010, that is, Messrs. Ritchie-Beaudin, Gravel, Bernatchez, Thériault and B.J., who do not have the same qualifications. In the case of B.J., who should have been ranked 47th, right behind L.L., his counsel suggests that an average of the earnings of Messrs. Thériault, Gravel-Bourgeois and Bernatchez be used, arguing that Mr. Ritchie-Beaudin's earnings should not be counted given that he did not work in 2010, an allegation that is disputed

by the union. The longshoremen who were added to Appendix A do not all have the same qualifications.

[94] In the Board's view, each methodology has its strengths and weaknesses and is subject to an unavoidable margin of error given the particular context applicable to longshoremen, especially with regard to the form of remuneration they receive.

[95] In light of the evidence adduced, that is, the earnings of the longshoremen in Appendix A in 2009 through to September 2012 and their individual qualifications at August 29, 2012 (material filed by the union—Exhibit 2, tab 25) and given the particular context applicable to longshoremen in terms of their remuneration, as discussed above, the Board finds that it is necessary to use the respective average of the gross monthly earnings of the longshoremen in Appendix A with the same qualifications as L.L. and then B.J. to determine their lost wages in 2010 and 2011, while at the same time taking into account the circumstances and the period of financial compensation applicable to each, as explained hereinafter. As we know, L.L. was not added to Appendix A, whereas B.J. was, but was ranked lower than he should have been. Given that L.L. was not in Appendix A, he was unable to collect group insurance benefits in 2010–2011 and 2012, whereas B.J., who was in Appendix A, was entitled to such benefits. The applicable periods of financial compensation are also different.

a–Case of L.L.

i–Period of Financial Compensation (Wages)

[96] The Board considers that the relevant period of financial compensation for L.L. should start on **February 12, 2010**, the date on which the first agreement eliminating the seniority criterion was signed with Logistec. The compensation period ends on November 17, 2011, when the union and employer offered to add L.L. to Appendix A. Although L.L. was declared unfit to work in November 2011, the Board does not accept the argument that L.L.'s health problems were rationally or directly connected with the circumstances that gave rise to the decision in RD 636.

[97] The Board accordingly orders the union to determine the amounts to be paid to L.L. on the basis of the formula set out above, that is, the average for 2010 and 2011 of the gross monthly

earnings of longshoremen in Appendix A with the same qualifications as L.L. (based on Exhibit 2, tab 25). For 2010, the amount should be based on the average gross monthly earnings of the longshoremen in Appendix A beginning on February 12, 2010. For 2011, the amount should be based on the average gross monthly earnings of the longshoremen in Appendix A to November 17, 2011.

ii–Deductions and Adjustments

[98] The evidence shows that L.L. earned $3,204 as a longshoreman in 2010 and also collected social assistance or employment insurance benefits in both 2010 and 2011. Since the methodology discussed above applies only as of February 12, 2010, L.L.'s earnings as a longshoreman prior to February 12, 2010, should not be deducted. As for any employment insurance or social assistance benefits collected by L.L., the parties will have to ensure that the benefits are paid back to the appropriate government authorities, if applicable, in accordance with the relevant legislation.

iii–Addition of L.L. to Appendix A

[99] L.L. testified that he no longer wanted to go back to work as a longshoreman because he was afraid of reprisals. The union, on the other hand, indicated that if L.L. returned to work, it would take whatever measures were necessary to resolve any such problems he encountered. The evidence moreover shows that, in September 2011, the union contacted employers Logistec and Porlier about adding L.L. to Appendix A. Both employers responded in October 2011 that they were willing to add L.L. to Appendix A provided L.L. passed the required tests. According to the union, it contacted L.L. to offer to add his name to Appendix A on or around November 17, 2011. In his testimony, L.L. stated that he had not been prepared to undergo the tests in November 2011 since he had been declared unfit to work by his doctor at the time in question. L.L. therefore did not undergo the appropriate tests.

[100] Given L.L.'s poor health at the time the union offered to add him to Appendix A, the Board is of the view that the union should renew its offer to L.L. to add his name to Appendix A, subject to his passing the required tests and medical exams, in the same way as other longshoremen. If L.L. agrees to return to work, subject to his meeting the required conditions, he

will become eligible for the group insurance plan from the time of his acceptance, it being understood that, had his name been added to the list in 2010, he would have been covered by the group insurance plan even if, in 2009, he had not worked the 1,000 hours that have been required only since the fall of 2011.

[101] Consequently, the Board orders the union to take the necessary steps to enable L.L. to have his name added to Appendix A and access the group insurance plan, assuming he is agreeable to doing so and passes the required tests.

g–Case of B.J.

[102] B.J.'s case is different from L.L.'s because, unlike L.L., B.J. was added to Appendix A, but he was improperly ranked. The methodology for calculating B.J.'s financial compensation is the same, however: use the average of the gross monthly earnings of the longshoremen in Appendix A with the same qualifications as B.J., for the period of financial compensation set out below.

i–Period of Financial Compensation (Wages)

[103] In B.J.'s case, the period of compensation for lost wages starts on March 8, 2010, when B.J. was placed on the seniority list but improperly ranked. The compensation period ends on September 30, 2011, when B.J. was declared unfit to work. Earnings from Logistec Minerai must be deducted, as requested by counsel for the complainant, as well as **only** those amounts B.J. earned as a longshoreman after March 8, 2010, and wage-loss insurance benefits he received between May 26 and September 30, 2011. Employment insurance benefits collected by B.J. in 2011 are not taken into account here, since, in the same way as for L.L., the parties will have to ensure that the benefits are paid back to the appropriate government authorities, if applicable, in accordance with the relevant legislation.

[104] The Board accordingly orders the union to determine the amounts to be paid to B.J. on the basis of the formula set out above, that is, the average for 2010 and 2011 of the gross monthly earnings of longshoremen in Appendix A with the same qualifications as B.J. (based on Exhibit 2, tab 25) for the period starting March 8, 2010, and ending September 30, 2011, minus

amounts collected by B.J. in wage-loss insurance benefits and earnings from work as a longshoreman or for Logistec Minerai between March 8, 2010, and September 30, 2011.

[105] Since October 1, 2011, B.J. has been in receipt of long-term wage-loss insurance benefits in accordance with the coverage provided by the group insurance plan, having been declared unfit to work. B.J. will therefore not be granted any financial compensation as of that date.

3–Pension Plan Pursuant to Letters of Agreement in Collective Agreements

[106] The Board orders the union to pay both L.L. and B.J. an amount equivalent to the employer's pension plan contributions for their respective financial compensation periods, as set out above.

4–Ruling on Legal Fees and Expenses

[107] On an exceptional basis only, given the very specific context in this matter, and considering that the legal fees and expenses appear to be reasonable in this matter, the Board orders the union to reimburse both L.L. and B.J. for all legal fees and expenses, per the notes respecting fees filed in evidence by counsel for the complainants.

5–Other Remedy

[108] With regard to the request by counsel for B.J. regarding the disciplinary action taken against him by the union, the Board is of the view that the finding made in this regard in RD 636, that B.J.'s status as a member in good standing should stand, is sufficient.

VII–Conclusion

[109] The Board retains jurisdiction over the matter and gives the union and employers 10 days from the date of these reasons for decision to submit to it the amounts to be paid to the complainants based on the parameters set out above. The complainants will have 10 days to make submissions in this regard. The employers and the union will then be given 10 days to make any additional submissions, if applicable. Should the parties fail to reach an agreement, the Board will decide on the amounts. To facilitate implementation of this decision, the Board asks

that the parties enter into contact with Mr. Jean-Daniel Tardif, Industrial Relations Officer with the Board.

[110] The Board accordingly reserves the right to issue a formal order in regard to the determination of the compensation to be paid to the complainants and, failing implementation of the decision, to file its decision on request pursuant to section 23 of the *Code* if necessary.

Translation

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Vice-Chairperson